

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES GUTIERREZ HERNANDEZ,

Defendant and Appellant.

B211561

(Los Angeles County  
Super. Ct. No. BA339106)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Affirmed in part, reversed in part and remanded with directions.

Michael John Shultz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

---

Andres Gutierrez Hernandez appeals from the judgment entered after a jury convicted him of simple assault, a lesser included offense of assault with a deadly weapon, and battery causing serious bodily injury and found true he personally inflicted great bodily injury in committing the battery. Hernandez contends the trial court erred by failing to dismiss his conviction of simple assault as a lesser included offense of the aggravated battery. We agree, but in light of other errors committed by the trial court we remand for resentencing.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The Charges*

Hernandez was charged by information with one count of assault with a deadly weapon (Pen. Code, § 245 subd. (a)(1))<sup>1</sup> and one count of battery causing serious bodily injury (§ 243, subd. (d)). A great bodily injury enhancement (§ 12022.7, subd. (a)) was alleged as to both counts; and a weapon use enhancement (§ 12022, subd. (b)(1)) was alleged as to the battery count.

### *2. The Jury Trial*

According to the People's evidence, in the early hours of April 13, 2008, Francisco Gervacio and a friend were drinking beer and listening to music on the radio of Gervacio's pickup truck, which was parked in the lot of their apartment building. Hernandez came out of his house and demanded that Gervacio turn off his radio. Gervacio told him to calm down; and Hernandez walked back to his house. He then returned, carrying a metal pipe. Hernandez swore at Gervacio and struck him in the head with the pipe, knocking Gervacio unconscious. Gervacio suffered injuries to his head that required metal staples and was hospitalized for three days.

Hernandez testified in his own defense that Gervacio was the aggressor and he denied hitting Gervacio with a metal pipe. According to Hernandez, after he told Gervacio to lower the volume of his truck radio Gervacio swore at Hernandez and then

---

<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

threw a can of beer, striking Hernandez in the head. Hernandez went back to his house and waited for police to arrive. When officers failed to respond, Hernandez again left his house to complain to Gervacio about the loud music. At some point, the two men confronted each other, and Gervacio punched Hernandez, who then hit Gervacio in the face. Gervacio fell to the ground.

### 3. *Jury Verdict and Sentencing*

The jury found Hernandez not guilty of assault with a deadly weapon, but guilty of both the lesser-included offense of simple assault (§§ 240, 241, subd. (a)) (count 1) and battery causing serious bodily injury (count 2). The jury also found not true the weapon use enhancement, but returned with a true finding as to the great bodily injury enhancement (§ 12022.7, subd. (a)) as to count 2.

According to the transcript of the sentencing hearing, after acknowledging the jury's true finding of the great bodily injury enhancement, the trial court did not refer to it later in sentencing Hernandez to a four-year state prison term for aggravated battery and a concurrent 180-day term for simple assault. The trial court awarded Hernandez 207 days of presentence custody credits, limiting his conduct credits pursuant to section 2933.1 [individual convicted of violent felony "shall accrue no more than 15 percent of worktime credit"].

## **DISCUSSION**

### 1. *The Simple Assault Conviction Must Be Reversed*

Hernandez's conviction of simple assault as a lesser included offense of the aggravated assault charged in count 1 was based on his act of punching Gervacio in the face, thus causing him to suffer a head injury. The same conduct was the basis for his conviction of aggravated battery in count 2. Hernandez contends, the People concede, and we agree simple assault is a lesser included offense of battery (see *People v. Lewis* (2008) 43 Cal.4th 415, 518; *People v. Colantuono* (1994) 7 Cal.4th 206, 216-217) and multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) Thus, on remand, the conviction on count 1 should be reversed.

2. *It is Necessary to Remand for Sentencing on the Section 12022.7, Subdivision (a) Enhancement*

In view of the trial court's failure to orally pronounce sentence as to the great bodily injury enhancement, remand is necessary for that purpose.<sup>2</sup> (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) In response to our request for supplemental briefing, the parties agree the trial court is precluded from applying the great bodily injury enhancement to Hernandez's sentence for aggravated battery because the terms "serious bodily injury" (aggravated battery) and "great bodily injury" (§ 12022.7, subd. (a)) have substantially the same meaning and therefore "great bodily injury is indeed an element of battery under section 243, subdivision (d)." (*People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375; accord, *People v. Beltran* (2000) 82 Cal.App.4th 693, 696-697; *People v. Otterstein* (1987) 189 Cal.App.3d 1548, 1550; *People v. Hawkins* (2003) 108 Cal.App.4th 527, 531.) However, the People invoke *People v. Gonzalez* (2008) 43 Cal.4th 1118 (*Gonzalez*) to argue that on remand the great bodily injury enhancement should be imposed and stayed. Hernandez maintains the great bodily injury enhancement cannot properly be imposed.

In *Gonzalez*, the California Supreme Court recently held when a jury finds true multiple firearm enhancements under section 12022.53 for the same offense, the trial court shall impose the enhancement with the longest term of imprisonment in accordance with section 12022.53, subdivision (f), and impose and stay the lesser firearm enhancements. (*Gonzalez, supra*, 43 Cal.4th at pp. 1129-1130.) The *Gonzalez* court explained interpreting section 12022.53, subdivision (f) to require the prohibited firearm enhancements to be stayed rather than stricken "serves the legislative goals of section 12022.53, by making the prohibited enhancements *readily* available should the section 12022.53 enhancement with the longest term be found invalid on appeal, and by making

---

<sup>2</sup> The People also note the minute order of the sentencing hearing states the "enhancement was not imposed pursuant to Penal Code section 654." The enhancement does not appear in the abstract of judgment.

‘the trial court’s intention clear—it is staying part of the sentence only because it thinks it must. If, on the other hand, the trial court were to strike or dismiss the prohibited portion of the sentence, it might be misunderstood as exercising its discretionary power under Penal Code section 1385.’ [Citation.]” (*Id.* at p. 1129 (original italics).)

Asserting that *Gonzalez* applies here by analogy, the People urge on remand the trial court must impose and stay the great bodily injury enhancement. *Gonzalez* is inapposite here, apart from the fact only a single enhancement is involved. Application of *Gonzalez* to the present case could “incur[ ] the risk of letting a defendant escape altogether,” which defeats the Supreme Court’s rationale. (*People v. Niles* (1964) 227 Cal.App.2d 749, 756, cited by *Gonzalez*, *supra*, 43 Cal.4th at p. 1129.) None of the firearm enhancements involved in *Gonzalez* was an element of attempted premeditated murder, the substantive offense for which the *Gonzalez* defendant was convicted, such that if the unstayed enhancement were later reversed on appeal, neither the remaining (stayed) enhancements nor the conviction would be affected. Under circumstances like those in the present case, if the great bodily injury enhancement were stayed and subsequently invalidated on appeal, the aggravated battery conviction would also necessarily be invalidated. As Hernandez correctly argues, on remand the judgment should reflect the finding of great bodily injury under section 12202.7, subdivision (a), although found true by the jury, is not to be imposed because it is an element of the offense of battery causing serious bodily injury under section 243, subdivision (d).

### 3. *The Presentence Custody Credits Must Be Recalculated*

The parties agree that the trial court believed, based on the great bodily injury enhancement, that Hernandez’s conviction amounted to a violent felony under section 667.5, subdivision (c)(8) and limited his presentence credits to 15 percent under section 2933.1, subdivision (a). (*People v. Hawkins*, *supra*, 108 Cal.App.4th at pp. 531-532.) Because the enhancement is not to be imposed, on remand the trial court should recalculate the presentence custody credits pursuant to section 4019.

## **DISPOSITION**

The judgment of conviction on count 2 for battery causing serious bodily injury is affirmed and the conviction on count 1 for simple battery is reversed. The cause is remanded for resentencing in accordance with the views expressed in this opinion.

**WOODS, Acting P. J.**

**We concur:**

**ZELON, J.**

**JACKSON, J.**